LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
SEP 4 1973
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1973

No. 73-419

ANTHONY BRIGANDI and DONALD BRIGANDI,

Petitioners,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

IRVING ANOLIK
Attorney for Petitioners
225 Broadway
New York, New York 10007
(212) 732-3050

(6480) LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing
South River, N.J. (201) 257-6850 New York, N.Y. (212) 565-6377 Philadelphia, Pa. (215) 563-5587 Washington, D.C. (202) 783-7288

INDEX TO BRIEF

	Page
Statement	1
Jurisdiction	2
Opinions Below	2
Constitutional and Statutory Provisions Involved	2
Questions Presented	2
Introductory	3
Evidence at Trial	7

Argument:

I. The rights of the petitioners were violated when the police obtained an ambiguous and dubious "consent" to conduct a search of their business premises after they were taken into custody and without advising them of their right not to accede to the police request to search. 11

II. The Courts below misconstrued the doctrine of Coolidge v. New Hampshire, with respect to items in "plain view." The medals and coins seized without a warrant were not contraband at sight and required a careful examination by an expert before seizure

Index

Page

could be effectuated. Plain view, therefore, should not have justified the warrantless search and seizure of the incriminating evidence. 24

III. The petitioners were prejudiced by the Trial Court's ruling that they could not have pretrial discovery of a tape recording made by one Rivera which was ultimately introduced into evidence. The granting of such relief is warranted under Alderman v. United States, 394 U.S. 165 (1969). 26

Conclusion 28

Order of Appellate Division (Donald Brigandi) (Filed January 16, 1973) 29

Order of Appellate Division (Anthony Brigandi) (Filed January 16, 1973) 30

Order of New York Court of Appeals Affirming Without Opinion (Filed June 6, 1973) 31

Table of Citations

CASES CITED:

Abel v. United States, 362 U.S. 217 22

Alderman v. United States, 394 U.S. 165 . 3, 6, 26

Index

Page

Boykin v. Alabama, 395 U.S. 238, 23 L.Ed. 2d 274, 89 S.Ct. 1709 (1969) . . . 12

Brady v. Maryland, 373 U.S. 83, 88 . . . 27

Brown v. Mississippi, 297 U.S. 278 . . . 18

Bumper v. North Carolina, 391 U.S. 544, 548 16

Carnley v. Cochran, 369 U.S. 506, 8 L. Ed. 2d 70, 82 S.Ct. 884 (1962) 12

Channel v. United States, 285 F.2d 217 . . 23

Chambers v. Maroney, 399 U.S. 42, 51 . . . 14

Chapman v. United States, 333 U.S. 10, 15 22

Chapman v. United States, 365 U.S. 610, 615 22

Chimel v. California, 395 U.S. 757 . . 6, 15, 25

Coolidge v. New Hampshire, 403 U.S. 443 . . . . . 3, 5, 6, 14, 22, 24

D. H. Overmyer Co. v. Frick Co., 405 U.S. 174, 31 L.Ed. 2d 124, 92 S.Ct. 775 (1972) 12

Escobedo v. Illinois, 378 U.S. 478 . . . . . 15, 18

Index

Page

Frazier v. Cupp, 394 U.S. 731, 740 22

Fuentes v. Shevin, 407 U.S. 67, 32 L.Ed. 2d 556, 92 S.Ct. 1983 (1972) 12

Ginsberg v. New York, 390 U.S. 629, 649 . . . 12

Gobart Importing Co. v. United States, 282 U.S. 344, 358 25

Hill v. California, 401 U.S. 797 22

Jencks v. United States, 353 U.S. 57 . . . 27

Johnson v. Zerbst, 304 U.S. 458, 464 . . . 21

Judd v. United States, 190 F.2d 649, 651 . . 23

Kolod v. United States, 390 U.S. 136 27

Katz v. United States, 389 U.S. 347, 357 . . . 14

Miranda v. Arizona, 384 U.S. 436 . . 6, 12, 15, 19, 21

People v. Rosario, 9 N.Y. 2d 286 27

Schneckloth v. Bustamonte, 36 L.Ed. 2d 854 . . 2, 3, 6, 11, 12, 13, 17, 18, 19, 20, 22, 23, 24

Schmerber v. California, 384 U.S. 757, 770-771 22

Spano v. New York, 360 U.S. 315 19

Index

Page

Stanley v. Georgia, 394 U.S. 557, 571 . . . 25

Steele v. United States, 267 U.S. 498 . . . 25

United States v. Jeffers, 342 U.S. 48, 51, 52 . . . . . 21, 22

United States v. Lifkowitz, 285 U.S. 452, 465 . . 25

United States v. Marrese, 336 F.2d 501 . . . 23

Vale v. Louisiana, 399 U.S. 30 . . . . . 21, 22

Villano v. United States, 310 F.2d 680, 684 23

Warren v. Hayden, 387 U.S. 294 at 298-299 . . . . . 21, 22

Zap v. United States, 328 U.S. 624 21

STATUTES CITED:

28 U.S.C. Section 1257(3) 2

UNITED STATES CONSTITUTION CITED:

Fourth Amendment 1

Fifth Amendment 1

Index

Page

Sixth Amendment 1

Fourteenth Amendment 1

OTHER AUTHORITIES CITED:

Bator & Vorenberg, "Arrest, Detention, Interrogation and the Right to Counsel: Basic Problems and Possible Legislative Solutions," 66 Colum. L. Rev. 62, 72-73 19

In The

Supreme Court of the United States

October Term, 1973

No. 73-

ANTHONY BRIGANDI and
DONALD BRIGANDI,

Petitioners,

-vs.-

THE PEOPLE OF THE STATE OF
NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Statement

Petitioners, jointly and severally, seek a writ of certiorari to the New York Court of Appeals from the order of that Court affirming without opinion, the order of the Appellate Division of the Supreme Court of the State of New York, First Department, which in turn had affirmed without opinion the judgment of the Supreme Court, New York County, rendered the 28th day of February, 1972, convicting each Petitioner, after trial, of the crimes of criminal possession of stolen property in the first degree and sentencing ANTHONY BRIGANDI to not more than three years imprisonment plus a $2,000.00 fine and sentencing DONALD BRIGANDI to a term of probation. ANTHONY BRIGANDI is now in custody.

Jurisdiction

The jurisdiction of this Court is predicated upon 28 U.S.C. Section 1257(3). The Court of Appeals of the State of New York and the Appellate Division, First Department, affirmed without opinion. The New York Court of Appeals affirmed the judgment of the Supreme Court and the order of the Appellate Division on the 6th of June, 1973.

Opinions Below

There was no opinion written by either the Appellate Divsion or the Court of Appeals in the Courts below.

Constitutional and Statutory Provisions Involved

The Fourth, Fifth, Sixth and Fourteenth Amendments of the United States Constitution are involved herein.

Questions Presented

1. Whether the subject of a search who is in actual custody can "consent" to a warrantless search and seizure without having been informed of his right to refuse to give such consent?

(a) This is the precise issue left open and unanswered in SCHNECKLOTH v. BUSTAMONTE, 36 L.Ed. 2d 854.

2. May the subject of a search "choose" to relinquish his Constitutional right to be free of unreasonable searches without knowing that he has the alternative of refusing to accede to a police request to search?

3. Whether it is essential that the subject of a search who is in custody be advised of his right to refuse to permit a warrantless search?

Questions Presented

4. Whether Petitioner's (ANTHONY BRIGANDI's) statement to the police, who were bent upon conducting a search, "Do what you want", can be deemed a "consent" in view of the fact that he was then in custody and had not been informed of his alternative of refusing to accede to the police request to search?

5. Whether the "plain view doctrine" of COOLIDGE v. NEW HAMPSHIRE, 403 U.S. 443, may justify a premeditated warrantless search and seizure where there was ample opportunity to obtain a search warrant?

6. Whether the failure of the Trial Court to grant pretrial discovery of a tape recording which was ultimately used in evidence against the Petitioners, violated the doctrine of ALDERMAN v. UNITED STATES, 394 U.S. 165?

7. Since the Petitioners herein are seeking direct review of the judgment of conviction, they are not involved in a collateral attack by *habeas corpus* such as in SCHNECKLOTH v. BUSTAMONTE, *supra*, Whether in view of this fact, *certiorari* should appropriately be granted?

Introductory

This case presents the issue which was left unanswered and open in the recent case of SCHNECKLOTH v. BUSTAMONTE, 36 L.Ed. 2d 854 (decided May 29, 1973), namely whether the subject of a search who is actually in custody may relinquish his Constitutional right to be free of unreasonable searches without knowing that he has the alternative of refusing to accede to a police request to search.

We believe that *certiorari* should be granted for this reason alone since there ought to be clarification on this point.

Introductory

In the case at bar the police had been investigating the disappearance of certain commemorative medals and coins manufactured by the Medallic Art Company. The Petitioners herein operated two coin stores - one at West 45th Street and another at West 44th Street, both in Manhattan.

Entering the 45th Street store without a warrant, the police saw certain medals and coins in a showcase and, after examining them, decided that these had been stolen from the Medallic Art Company, at which point it is alleged that the Petitioners were placed under arrest.

The police however, were intent upon conducting a search of the 45th Street and 44th Street stores and, without advising the BRIGANDIS of their alternative not to accede to the police request to search, they asked ANTHONY BRIGANDI whether they could search their stores and received the ambiguous and helpless response "Do what you want".

THE PEOPLE no doubt had an opportunity to obtain a search warrant since they had been conducting an investigation for some time. No search warrant, however, was secured.

THE PEOPLE OF THE STATE OF NEW YORK alleged that ANTHONY BRIGANDI had "consented" to a search which turned out to be a *sine qua non* for a conviction.

It is not disputed that upon entering the premises of the Petitioners, the authorities had no probable cause whatsoever to make an arrest.

It is the *a fortiori* position of the Petitioners that since they had no probable cause to make an arrest, they certainly had no probable cause to make a warrantless search and seizure.

The prosecution, however, maintained that the statement of ANTHONY BRIGANDI - "Do what you want" - in response to lawful authority, constituted a "consent", since otherwise there obviously could not have been a valid arrest.

The position taken on this petition is that the consent was meaningless since it was in response to lawful authority and, consequently, could not constitute that type of "consent" to take the search and seizure out of the prohibitions of the Fourth Amendment of the United States Constitution.

It must be borne in mind that although the BRIGANDIS were in custody when the alleged consent, "Do what you want," was uttered, it is not disputed in the record that these Petitioners who had never been in conflict with the law previously, were not advised of their Constitutional rights to refuse to consent to any search. How could they "waive" an unknown right?

It is submitted that there could not have been any arrest at all unless there had been a valid search and seizure. There was no probable cause for the warrantless search and seizure, nor was there any probable cause for the arrest.

The *nisi prius* Court was obviously confused by what had occurred and, in rejecting the motion to suppress, came to the incorrect conclusion that the search was an incident of a lawful arrest.

In the first place, there were two premises involved, namely West 45th Street and West 44th Street.

The initial search and seizure at the 45th Street store, conducted by a ruse and the excuse of the "plain view doctrine" of COOLIDGE v. NEW HAMPSHIRE, *supra*,

resulted in the arrest of the Petitioners. The officers had no search warrant and they were not looking for any weapons (CHIMEL v. CALIFORNIA, 395 U.S. 752).

They already had placed the Petitioners in custody and it was at this juncture that they sought and received the ambiguous "consent" to conduct searches at 44th Street and 45th Street from ANTHONY BRIGANDI, despite the fact that no warnings had been given of the Petitioners' right not to consent (MIRANDA v. ARIZONA, 384 U.S. 436, and SCHNECKLOTH v. BUSTAMONTE, *supra).*

The omission to have articulated the Constitutional rights of the Petitioners not to consent was not considered in determining whether or not there was an actual consent, since the Courts below undoubtedly ruled that such advice was not required. Indeed, it is submitted that the question of proper consent should have been submitted to the jury, or at least a specific factual determination by the Trial Court on this issue should have been made.

The Courts below misconstrued the "plain view doctrine" of COOLIDGE v. NEW HAMPSHIRE, *supra*, as will be explained *infra.*

The activities of the prosecution in derogation of the Constitutional rights of the Petitioners, was further exacerbated by the use of a surreptitious tape recording by one Rivera, the contents of which were withheld from a pretrial suppression hearing. In this context it is alleged that the doctrine of ALDERMAN v. UNITED STATES, 394 U.S. 165, was violated.

Evidence at Trial

The Petitioners, ANTHONY and DONALD BRIGANDI, are father and son. Together with Anthony Brigandi's wife Anna, they are the sole stockholders in Donald E. Brigandi Company, Inc., a firm that is in the wholesale and retail coin business. At the times mentioned herein, the firm operated the West 45th Street and West 44th Street stores.

Both Petitioners worked in the stores together with a younger son Robert, sometimes referred to in the testimony as Andy. A Mr. Metterson was in charge of the 44th Street store on November 18, 1970. Anna Brigandi is not employed.

Neither Petitioner has any prior criminal record.

ANTHONY BRIGANDI is 55 years old, a grandfather and a disabled World War II veteran who received two honorable discharges and earned two Good Conduct Medals. He supports two sons, one in college and one in high school, in addition to his wife.

DONALD BRIGANDI is presently 25 years old and supports a wife and two infant children.

In April 1971, a New York County Grand Jury indicted both Petitioners upon three counts of criminal possession of stolen property. Specifically, the first count charges such *possession* in the first degree during the period from May 1, 1970 until November 18, 1970, of a quantity of commenorative coins, the property of Medallic Art Company, having an aggregate value in excess of $1,500.00. The *second* count charges criminal possession of a quantity of Apollo XII and XIII commemorative coins, the property of Medallic Art Company during the same period of time having an aggregate value in excess of $1,500.00. The *third* count charges criminal possession of

a quantity of commemorative coins property of Medallic Art Company, during the same period of time, of an aggregate value in excess of $250.00.

Medallic Art Company ("Medallic") manufactures commemorative medals for other companies who distribute them for sale through retail outlets. The Presidential Art Medals, Inc. ("Presidential") commissioned Medallic to make 10,000 silver Apollo XII medals and 15,000 bronze. Thereafter Presidentail cut the order to 6,000 silver medals. At that time, Medallic had already manufactured 6,100 of them. Medallic shipped 5,800 to Presidential but Presidential returned 531 as rejects. These rejects and the 300 unshipped surplus medals—831 medals in all—were unserialized. These 831 medals were ordered defaced to be sent to a refinery for smelting.

The manufacturer's price for Apollo XIIs was $16.50. The list retail price was $35.00, and some dealers, including Presidential, cut the retail price. The silver content value of each medal, depending on weight, was $8.00. Some dealers bought these medals for their silver-content value alone. Other metals manufactured by Medallic were sold at various wholesale prices, ranging from $2.49 to $18.50. Some metals were given away as gratuities for services rendered to Medallic.

Inventories in June or July and November 1970 showed shortages of several hundred Apollo XII medals. Medallic thereupon employed a private investigating firm in May 1970 and the police assigned a Detective Keables to the case in June 1970.

Mark Adrian and Raymond Rivera, Medallic employees, admitted that they were stealing unserialized medals as "partners" and selling them to the Petitioners at prices a

little below their silver value and no questions were asked of them. They testified they also sold such medals to others. Later Rivera worked with another employee, Ortega, as a partner.

Adrian said he sold unspecified medals at unspecified times and at unspecified prices to DONALD BRIGANDI on 15 occasions. The facts, circumstances and prices of these alleged sales were not disclosed. All other alleged sales were made to ANTHONY BRIGANDI. Adrian was 16 years old at the time but admittedly looked much older. His contact with the Petitioners lasted only 2 months, June and July of 1970. He testified that he introduced Rivera in June 1970 to ANTHONY BRIGANDI as his partner, but Anna Brigandi produced documentary proof that she and Anthony BRIGANDI were in Europe in June 1970, when the introduction allegedly took place. The documentary proof consisted of a U. S. passport and an airline scroll (A-878), and was not rebutted by the prosecution.

On November 18, 1970, Rivera was equipped with a recording device, given a box of Medallic Art medals and instructed to go to the West 45th Street Store and do what had had in the past. Rivera entered this store with the box of medals and disposed of them to someone in the store.

Keables saw Rivera enter the store. Two customers and three Brigandis were present. He could not see which of the three Brigandis Rivera approached or who paid for the medals. He had no conversation with Rivera when he left the store, nor did he listen to the tape recording on Rivera at that time.

Some minutes later, Detective Keables entered the store and spoke to ANTHONY without warning him of his rights to remain silent and to have the assistance of counsel. ANTHONY said that he had just purchased some

medals from a Spanish looking fellow. Ruete of Medallic then entered the store and after inspecting the medals which were removed from the showcase, identified them as his property.

After Ruete of Medallic identified some medals removed from a display case as Medallic property, Keables placed both Petitioners under arrest "on the spot". He said he then asked ANTHONY for "permission" to visit Petitioners' 44th Street Store, to which ANTHONY replied, "Do what you want". Twenty-four medals were seized at the West 44th Street Store.

A pre-trial motion to suppress these 30 medals as having been seized unlawfully in violation of Petitioners' constitutional rights, was denied, the Court stating that Petitioners were confusing the motion to suppress with the Fourth Amendment. These 30 medals were the only allegedly stolen medals received in evidence at the trial. Other medals allegedly stolen and allegedly sold to the Petitioners were never produced.

Medals that are not mint perfect are often sold to smelters for their silver content. The practice in the trade followed in buying medals from strangers and young people was in dispute.

There was abundant evidence that many employees at Medallic were stealing medals. Rivera contradicted himself several times and both he and Adrian stated they had lied to investigators in the case and before the Grand Jury.

Adrian gave ANTHONY an incorrect name and address. He sold to the Petitioners because the Petitioners give him the best deal.

Rivera never dealt with DONALD. The medals he sold were unserialized. Many silver medals are sold which do

not bear serial numbers.

In this posture of events both Petitioners are stamped as felons. In addition, ANTHONY faces a three-year indeterminate sentence in State prison plus a heavy fine, and has commenced service of his sentence.

Argument

I.

The Rights of the Petitioners Were Violated When the Police Obtained an Ambiguous and Dubious "Consent" to Conduct a Search of Their Business Premises After They Were Taken Into Custody and Without Advising Them of Their Right Not to Accede to the Police Request to Search.

In SCHNECKLOTH v. BUSTAMONTE, 36 L.Ed. 2d 854 at 875, this Court made it clear that it was not attempting to determine whether or not warnings as to Constitutional rights are necessary prior to obtaining consent to search from the subject of such search who is then in actual custody. This Court explained (id. at 875):

> "*Our* decision today is a narrow one. We hold only that *when the subject of a search is not in custody* and the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied. Voluntariness is a question of fact to be determined from all the circumstances, and while the subject's knowledge of a right to refuse is a factor to be taken into

account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent." (emphasis ours)

In SCHNECKLOTH v. BUSTAMONTE, *supra*, this Court was aware of the fact that in MIRANDA v. ARIZONA, 384 U.S. 436, warnings were held to be mandatory where the subject of police questioning was in actual custody. This Court felt that it was quite significant in determining a valid consent to inquire whether a person was in custody or not.

We also emphasize the fact that this petition is presented in an effort to review the judgment of conviction and is not a collateral attack by *habeas corpus* which was so significant in the SCHNECKLOTH decision.

In GINSBERG v. NEW YORK, 390 U.S. 629, 649, the concurring opinion of Justice Stewart noted that the capacity to choose necessarily depends upon knowledge that there is a choice to be made.

The Courts below came to the peculiar and incongruous conclusion that a person could validly waive his rights under the Fourth Amendment without knowing that he had the alternative of refusing to give his consent.

This Court has always scrutinized with great care claims that a person has foregone the opportunity to assert Constitutional rights.

See, FUENTES v. SHEVIN, 407 U.S. 67, 32 L.Ed. 2d 556, 92 S.Ct. 1983 (1972); D.H. OVERMYER CO. v. FRICK CO., 405 U.S. 174, 31 L.Ed. 2d 124, 92 S. Ct. 775 (1972); BOYKIN v. ALABAMA, 395 U.S. 238, 23 L.Ed.2d 274, 89 S.Ct. 1709 (1969); CARNLEY v. COCHRAN, 369 U.S. 506, 8 L.Ed. 2d 70, 82 S.Ct. 884 (1962).

Argument

There is no reason to give the claim that a person has consented to a search any less rigorous scrutiny.

As Justice Marshall pointed out in his dissent (SCHNECKLOTH v. BUSTAMONTE, 36 L.Ed. 2d at 892, 893):

> "Every case in this Court involving this kind of search has therefore spoken of consent as a waiver: See, e.g., Amos v United States, 255 US 313, 317, 65 L Ed 654, 41 S Ct 266 (1921); Zap v United States, 328 US 624, 628, 90 L Ed 1477, 66 S Ct 1277 (1946); Johnson v United States, 333 US 10, 13 92 L Ed 436, 68 S Ct 367 (1948): Perhaps one skilled in linguistics or epistemology can disregard those comments, but I find them hard to ignore."

This Court itself specifically left open the issue presented in the case at bar; namely, must warnings be given before a valid consent can be obtained from the subject of a search who is in actual custody?

In view of the MIRANDA case, *supra*, it is difficult to rationalize any basis for withholding of any such warnings under these circumstances.

If consent to search means that a person has chosen to forego his right to exclude the police from the place they seek to search, it follows that his consent cannot be considered meaningful unless he knew that he could in fact choose to exclude the police.

This Court, of course, is well aware of the doctrine of "response to lawful authority". Thus, as the Circuit Court said in BUSTAMONTE v. SCHNECKLOTH, 448 F. 2d 699, 701:

Argument

"Under many circumstances a reasonable person might read an officer's 'May I' as the courteous expression of a demand backed by force of law."

It is well settled under the Fourth and Fourteenth Amendments that a search conducted without a proper warrant issued upon probable cause is "per se unreasonable . . . subject only to a few specifically established and well delineated exceptions." KATZ v. UNITED STATES, 389 U.S. 347, 357; COOLIDGE v. NEW HAMPSHIRE, 403 U.S. 443, 454-455; and CHAMBERS v. MARONEY, 399 U.S. 42, 51.

It is equally well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to "consent". DAVIS v. UNITED STATES, 328 U.S. 582, 593-594; ZAP v. UNITED STATES, 328 U.S. 624, 630; and SCHNECKLOTH v. BUSTAMONTE, 36 L.Ed. 2d 854 (1973).

The Respondent herein necessarily must concede that there was no search warrant and that when the officers entered the premises of the Petitioners, they had no probable cause to make an arrest. Nor can THE PEOPLE dispute the obvious fact that the officers who entered Petitioners premises on the day of the arrest were intent upon conducting a warrantless search.

The Trial Judge who heard the suppression evidence in a pretrial hearing, stated in his decision that the search and seizure was justified as an incident of a lawful arrest.

It is important to understand the chain of events.

On November 18th, 1970, three police detectives attached to the Police Department of the City of New York, entered the West 45th Street store of the

Petitioners. One, a Detective Keables, testified at the suppression hearing that he told Petitioner ANTHONY BRIGANDI, that he was a police officer but did not advise either of the Petitioners, both of whom were targets of an investigation, of their Constitutional rights under traditional due process rules such as ESCOBEDO v. ILLINOIS, 378 U.S. 478, and MIRANDA v. ARIZONA, 384 U.S. 436.

An employee of Medallic Art Company, one Ruete, peered in the 45th Street store at this juncture and saw certain medals in a showcase from which they were removed and examined. Keables testified (A-104) that Ruete identified these medals as "belonging to the Medallic Art Company" ever though they were fungible items and there was no evidence of theft at that point. Notwithstanding this fact, both Petitioners were placed under arrest on the spot.

On the record, however, Justice Murtagh denied the motion to suppress the items seized at the West 45th Street store, holding, *inter alia:*

> "The above items were seized, being in plain view of the arresting officers, and as an *incident to the arrest* of the defendants Anthony and Donald Brigandi. Accordingly the seizures were in complete conformity with Chimel v. California, 395 U.S. 752 (1969)."

It is extremely important to note that the Trial Judge did not attempt to justify his holding that the search and seizure were proper on the basis of "consent".

On the contrary, what the Trial Judge actually did was to state that the warrantless search in essence justified an arrest except that in writing his conclusion, the Court

completely misconstrued the facts and the sequence of events. From reading Justice Murtagh's decision it is obvious that the *nisi prius* Court believed that an arrest had first been made and then a search conducted. This is not at all what occurred. The prosecution on this petition cannot deny that the chain of events were the complete reverse of the holding of the Trial Court, namely that there was an examination of certain medals which were taken out of a showcase window and following that examination a declaration by someone in the employ of Medallic Art Company that they were the property of Medallic. Then, and only then, did an arrest occur.

It is elementary, of course, that a search invalid *ab initio* is not validated by what has been discovered. (BUMPER v. NORTH CAROLINA, 391 U.S. 543, 548 n. 10).

After the Petitioners were placed under arrest, the request to conduct further searches was made and it is in this context that the "consent" to search the premises of the Petitioners was allegedly obtained when ANTHONY BRIGANDI uttered the words "Do what you want".

The initial search and seizure, after the officers entered the West 45th Street premises, was supposedly justified under the so-called "plain view doctrine" of COOLIDGE v. NEW HAMPSHIRE, *supra*. The subsequent searches were allegedly justified on the theory of "consent".

The paradox, however, is that no effort was made to justify any of the searches on the basis of the "plain view doctrine" since these medals and coins were fungible and by merely looking at them through a showcase window, no one could have assumed that they were contraband or stolen. Thus neither the "plain view doctrine" nor the "consent" while in custody exception to the Fourth Amendment could have justified the activities of the police in this case.

Argument

Part and parcel of the case involved another search of the other store of the Petitioners at 120 West 44th Street. The arresting officers stated that "permission" was given to them to conduct a search there by Petitioner ANTHONY BRIGANDI.

The actual colloquy, however, reveals that the contrary is the case. During the colloquy the officer, on cross-examination (Detective Keables), was asked:

> "Q. Did he say that he was giving you his permission to go to the other store, and get those Medallic Art Medals?
>
> "A. He said, 'Do what you want.'
>
> "Q. He said, 'Do what you want'?
>
> "A. Yes."

It is also significant that when *this alleged consent was given to conduct the search at the 44th Street store, Detective Keables admitted the following:*

> "When those medals in the display case were identified as the property of Raymond Ruddy [sic], and when Anthony Brigandi said to you, 'Do as you want,' *Anthony Brigandi was already in custody at that time* is that correct?
>
> "Yes."

Thus we submit that we have a completely different situation herein than the circumstances which were present in SCHNECKLOTH v. BUSTAMONTE, *supra*, In the SCHNECKLOTH case, this Court found that after the officers had stopped the car, they had been told "Sure, go ahead", when they asked if they could search the car. In SCHNECKLOTH this Court further found:

Argument

> "Prior to the search no one was threatened with arrest and, according to Officer Rand's uncontradicted testimony, it 'was all very congenial at this time.' " (36 L.Ed. 2d at 858, 859).

Further, in SCHNECKLOTH, this Court seemed to approve the Trial Court's determination that proper consent to the search had been given This Court noted that:

> "in the instant case the prosecution met the necessary burden of showing consent . . . since there were clearly circumstances from which the trial court could ascertain that consent had been freely given without coercion or submission to authority. Not only Officer Rand, but Gonzales, the driver of the automobile, testified that Alcala's assent to the search of his brother's automobile was freely given. At the time of the request to search the automobile, the atmosphere, according to Rand was 'congenial' and there had been no discussion of any crime."

The most extensive judicial exposition of the meaning of "voluntariness" has been developed in those cases in which the Court has had to determine the "voluntariness" of a defendant's confession for the purpose of the Fourteenth Amendment.

Almost forty years ago, in BROWN v. MISSISSIPPI, 297 U.S. 278, this Court held that a criminal conviction based upon a confession obtained by brutality and violence was Constitutionally invalid under the due process clause of the Fourteenth Amendment.

In some thirty different cases decided during the era that intervened between BROWN and ESCOBEDO v.

Argument

ILLINOIS, *supra*, this Court was faced with the necessity of determining whether in fact the confessions in issue had been "voluntarily" given. It is to that body of case law that we must look, as well as to the recent case of SCHNECKLOTH v. BUSTAMONTE, *supra*, to determine voluntariness of the consent.

Again we remind this Court that the defendant-petitioners, ANTHONY BRIGANDI and DONALD BRIGANDI, were both actually in custody at the time the alleged consent to search the 44th Street store was given.

It is not alleged that there was any consent to search the 45th Street store, prior to the arrests.

The search of the 45th Street store was clearly improper under any theory since there was no search warrant and since there could not have been an "open view" exception because the medals involved had to first be examined carefully before it could be determined that they were the property of Medallic Art Company.

Obviously a consent wrested by trickery or in response to lawful authority, is not the type of consent which will take the search out of the restrictions of the Fourth Amendment. (MIRANDA v. ARIZONA, *supra*, SPANO v. NEW YORK, 360 U.S. 315; BATOR & VORENBERG, "Arrest, Detention, Interrogation and the Right to Counsel: Basic Problems and Possible Legislative Solutions", 66 Colum.L.Rev. 62, 72-73).

In SCHNECKLOTH, this Court noted that in all of the cases which were reviewed there, there was no single controlling criterion. "Each reflected a careful scrutiny of all the surrounding circumstances."

Argument

One of the important aspects of course, which was not present in SCHNECKLOTH, is that in the case at bar the Petitioners were in custody when the consent was obtained. Secondly, there was no congeniality or free exchange among the parties prior to the giving of the alleged consent, as was the case in SCHNECKLOTH. Additionally, it must be borne in mind that the Petitioner ANTHONY BRIGANDI merely said "Do what you want" and did not say "Sure, go ahead", as was the situation in SCHNECKLOTH.

Moreover, in the case at bar we were not dealing with an automobile, as they were in SCHNECKLOTH, but rather, two stores, which undoubtedly had been under surveillance for some time. There was absolutely no problem in getting a search warrant and, indeed, that is what should have been done in the case at bar.

The testimony reveals that there had been coaching by detectives of two of the witnesses who later became material in the prosecution, namely Mark Adrian and Raymond Rivera, who admitted that they were stealing unserialized medals as "partners" and selling them to the Petitioners at prices a little below their silver value with no questions asked of them.

There was other testimony in the record that there were varying prices paid for these medals and that the fact that they were bought or sold at below their silver value was not in itself indication of knowledge that they were stolen. The market varies quite a bit in these items.

In SCHNECKLOTH this Court specifically noted that in the case of custodial questioning or the obtaining of custodial consent, the question was far different.

Argument

A consent, of course, is a waiver of Constitutional rights (JOHNSON v. ZERBST, 304 U.S. 458, 464).

But, as noted in MIRANDA v. ARIZONA, 384 U.S. at 475, the Supreme Court held:

> "This court has always set high standards of proof for the waiver of Constitutional rights . . . and we reassert those standards as applied to *in custody* interrogations. Since the state is responsible for establishing the isolated circumstances under which the interrogation takes place and has the only means of making available corroborated evidence of warnings given during incommunicado interrogations, the burden is rightly on its shoulders."

It must therefore be emphasized that in the case at bar there was absolutely no showing by the prosecution that either of the Petitioners was told that he did not have to consent to a search, even though he may have been told generally about his rights and right to consult with counsel.

In VALE v. LOUISIANA, 399 U.S. 30, and WARDEN v. HAYDEN, 387 U.S. 294, as well as ZAP v. UNITED STATES, 328 U.S. 624, this Court has emphasized that the circumstances must be unusual where a search warrant may be dispensed with. The burden is on the Government to establish that a search is proper where no search warrant has been secured.

We must bear in mind that there was no suggestion in this case that prior to the initial search that there had been any consent (ZAP v. UNITED STATES, *supra*). In addition, the officers were not responding to an emergency, UNITED STATES v. JEFFERS, 342 U.S. 48, 51, 52. They were not in hot pursuit of a fleeing felon

(WARDEN v. HAYDEN, *supra*, at 298-299; CHAPMAN v. UNITED STATES, 365 U.S. 610, 615). The goods ultimately seized were not in the process of being destroyed, SCHMERBER v. CALIFORNIA, 384 U.S. 757, 770-771; UNITED STATES v. JEFFERS, *supra*. Nor were they about to be removed from the jurisdiction (CHAPMAN v. UNITED STATES, 333 U.S. 10, 15 and UNITED STATES v. JEFFERS, *supra*).

It should also be noted that the officers had previously equipped Rivera with a tape recording device and, in fact, a recording had been made and was ultimately introduced into evidence. It is therefore obvious that there was substantial investigation and there was no reason why the officers could not have obtained a search warrant under the circumstances. (See VALE v. LOUISIANA, *supra*).

We also point out that this case does not present a situation where there was a third party consent such as in COOLIDGE v. NEW HAMPSHIRE, id at 487-490, where a wife surrendered to the police guns and clothing belonging to her husband.

FRAZIER v. CUPP, 394 U.S. 731, 740, held that evidence seized from the defendant's duffle bag in a search authorized by his cousin's consent was admissible at trial. See also, ABEL v. UNITED STATES, 362 U.S. 217 and HILL v. CALIFORNIA, 401 U.S. 797, 802-805, where it was held that the police had validly seized evidence from the petitioner's apartment incident to the arrest of a third party, since the police had probable cause to arrest the petitioner and reasonably, though mistakenly, believed that the man they had arrested was he. None of these elements are present in the case at bar.

It is of paramount importance to also note that in the recent case, and perhaps the most recent decision on consent, SCHNECKLOTH v. BUSTAMONTE, *supra*, this

Court, in footnote number 29, specifically declared the following (36 L.Ed. 2d 870):

> "As we have already noted, supra, . . . *Miranda* itself involved interrogation of a suspect *detained in custody* and did not concern the investigatory procedures of the police in general on-the-scene questioning. 394 U.S., at 477.
>
> By the same taken, the present case does not require a determination of the proper standard to be applied in assessing the validity of a search authorized solely by an alleged consent that is obtained from a person after he has been placed in custody. We do note however, that other courts have been particularly sensitive to the *heightened possibilities of coercion when the 'consent' to a search was given by a person in custody.* See, e.g., Judd v. United States, 190 F. 2d 649, 651; Channel v. United States, 285 F. 2d 217; Villano v. United States, 310 F. 2d 680, 684; and United States v. Marrese, 336 F. 2d 501." (Emphasis ours)

The concurring opinions in this Court in the SCHNECKLOTH case were also concerned over the fact that the search and the consent issue were being raised collaterally on *habeas corpus*. Here, again, the situation is not the same in the case at bar where there is a direct petition for certiorari to this Court from the affirmance by the highest Court of the State.

In the case at bar, of course, the issues were carefully preserved in the lower Courts and there is no *habeas corpus* collateral attack.

Therefore, it is submitted that this Court should review the case at bar because it presents the very issue held in abeyance in SCHNECKLOTH v. BUSTAMONTE, namely

what is the effect of the securing of "consent" to a search when the giver of that consent is in police custody and unaware of his rights? This issue was not reached in SCHNECKLOTH and, therefore, the case at bar presents a proper vehicle by which this Court can and should clarify the law in this regard.

II.

The Courts Below Misconstrued the Doctrine of Coolidge V. New Hampshire, With Respect to Items in "Plain View". The Medals and Coins Seized Without a Warrant Were Not Contraband At Sight and Required a Careful Examination By an Expert Before Seizure Could Be Effectuated. Plain View, Therefore, Should Not Have Justified the Warrantless Search and Seizure of the Incriminating Evidence.

The Trial Court, as has been noted in the preceding Point, was confused and mistaken about the sequence of events.

The Trial Court had assumed that the arrest occurred before the first search. Even the prosecution does not allege that that was the sequence of events. It is obvious from the record that the first search occurred and the seizure was effectuated before the arrest occurred.

For the initial search at the 45th Street store, the Trial Court relied upon the "plain view" doctrine of COOLIDGE v. NEW HAMPSHIRE, predicated upon its mistaken assumption that a valid arrest had already occurred.

COOLIDGE v. NEW HAMPSHIRE, *supra*, is not a case upon which the police and the prosecution had a right to rely. In COOLIDGE this Court carefully explained:

Argument

> "An example of the applicability of the 'plain view' doctrine is the situation in which the police have a warrant to search a given area for specified objects and in the course of the search come across some other article of *incriminating* character. Cf. *Gobart Importing Co. v. United States*, 282 U.S. 344, 358; *United States v. Lifkowitz*, 285 U.S. 452, 465; *Steele v. United States*, 267 U.S. 498; *Stanley v. Georgia*, 394 U.S. 557, 571."

The Court went on to explain that the plain view doctrine obviously does not merely permit the seizure of items in plain view unless they are of an incriminating nature. The Court explained further at the same page:

> "It is well established that under certain circumstances the police may seize evidence in plain view without a warrant. But it is important to keep in mind that, in the vast majority of cases, *any* evidence seized by the police will be in plain view, at least at the moment of seizure. The problem with the 'plain view' doctrine has been to identify the circumstances in which plain view has legal significance rather than being simply the normal concomitant of any search, legal or illegal."

Reliance upon CHIMEL v. CALIFORNIA, 395 U.S. 752 (1969) is not justified since this was not a search incident to a lawful arrest and, under any circumstances, the police were certainly not looking for any weapons.

Argument

III.

The Petitioners Were Prejudiced by the Trial Court's Ruling that They Could Not Have Pretrial Discovery of a Tape Recording Made by One Rivera Which Was Ultimately Introduced Into Evidence. The Granting of Such Relief is Warranted Under Alderman V. United States, 394 U.S. 165 (1969).

It is not disputed that a tape recording was made by Rivera and that this recording was used in evidence at the trial. During the pretrial suppression hearings there was a demand that the recording be made available prior to the trial. The Petitioners' counsel stated (A-155, 156):

> "If there were recordings made, we are entitled to them before trial."

Judge Murtagh, however, denied this defense request, declaring:

> "The District Attorney has a continuing obligation to furnish you with any exculpatory evidence, but I assume that when he is not doing this, he feels that he does not have any.
>
> *I must leave that choice to him*"

This, of course, is in direct conflict with this Court's decision in ALDERMAN v. UNITED STATES, 394 U.S. 165 (1969). In that case, this Court made it abundantly clear that there was an absolute right on the part of the defendant to have a recording made of a conversation with him for pretrial determination as to its Constitutional viability and whether a motion to suppress could be made.

The prosecutorial eye is frequently out of focus. The Court did not even listen to it *in camera.* Under the

circumstances, this was a clear abuse of discretion and a violation of the Constitutional rights of the Petitioners.

See KOLOD v. UNITED STATES, 390 U.S. 136; BRADY v. MARYLAND, 373 U.S. 83, 88; JENCKS v. UNITED STATES, 353 U.S. 657; and cf., PEOPLE v. ROSARIO, 9 N.Y. 2d 286.

In KOLOD, this Court at 390 U.S. 137-138, explained:

> "We cannot accept the Department's *ex parte* determination of relevancy in lieu of such determination in an adversary proceeding in the District Court . . . the District Court will make such finding of fact on these questions as may be appropriate in light of further evidence and of the entire existing record."

The suppression hearing was incomplete without discovery and an adversary proceeding with respect to the tape recording.

Conclusion

The Writ of Certiorari Should be Granted and the Judgments of Conviction Reserved.

Respectfully submitted,

IRVING ANOLIK
Attorney for Petitioners

Order of Appellate Division (Donald Brigandi)

(Filed January 16, 1973)

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on January 16, 1973

Present—Hon. Theodore R. Kupferman, Justice Presiding,
Francis T. Murphy, Jr.
Myles J. Lane
Aaron Steuer, Justices

The People of the State of New York,

Plaintiff-Respondent,

-against-

Donald Brigandi,

Defendant-Appellant.

An appeal having been taken to this Court by the defendant-appellant from the judgment of the Supreme Court, New York County (Baer, J.), rendered on February 28, 1972, convicting him of the crime of criminal possession of stolen property in the first degree, and said appeal having been argued by Mr. William E. Ringel of counsel for the appellant, and by Mr. Barry M. Fallick of counsel for the respondent; and due deliberation having been had thereon,

It is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed.

ENTER:

s/Hyman W. Gamso
Clerk.

Order of Appellate Division (Anthony Brigandi)

(Filed January 16, 1973)

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on January 16, 1973.

Present—Hon. Theodore R. Kupferman, Justice Presiding
Francis T. Murphy, Jr.
Myles J. Lane
Aron Steuer, Justices

The People of the State of New York,
Plaintiff-Respondent,

-against-

Anthony Brigandi,
Defendant-Appellant.

An appeal having been taken to this Court by the defendant-appellant from the judgment of the Supreme Court, New York County (Baer, J.), rendered on February 28, 1972, convicting him of the crime of criminal possession of stolen property in the first degree, and said appeal having been argued by Mr. William E. Ringel of counsel for the appellant, and by Mr. Barry M. Fallick of counsel for the respondent; and due deliberation having been had thereon.

It is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed.

ENTER:

s/Hyman W. Gamso
Clerk.

Order of New York Court of Appeals Affirming Without Opinion

(Filed June 6, 1973)

Court of Appeals
State of New York

The People of the State of New York,

Respondent,

-against-

Anthony Brigandi and Donald Bridandi,

Appellants.

Orders of the Appellate Division, First Department Affired. No opinion.

All concur.

June 6, 1973

Clerk